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Nos. 01-10873, 02-5034

IN THE

Supreme Court of the United States

KHANH PHUONG NGUYEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CONSOLIDATED REPLY BRIEF OF PETITIONERS

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CONSOLIDATED REPLY BRIEF OF PETITIONERS

One simple proposition governs these cases: Only Article III judges may sit on Article III courts. Whatever other difficulties may attend the proper interpretation of Article III, § 1, this rule stands as an irreducible constitutional minimum. This Court has never suggested, much less held, that anyone other than Article III judges may staff the Article III courts. The failure to observe this basic precept in these cases violated Title 28; Article III of the Constitution; and the Appointments Clause. The appropriate remedy is to vacate the judgment and remand the cases to be heard by a properly-constituted panel of the Ninth Circuit.

I. THE DESIGNATION OF JUDGE MUNSON WAS ERRONEOUS FOR THREE INDEPENDENT REASONS.

1. The designation of Judge Munson—an Article IV officer of the District Court for the Northern Mariana Islands—to sit on the Ninth Circuit was absolutely unauthorized by the governing statute, 28 U.S.C § 292(a). Pet'r Br. 7-15. Respondent concedes this obvious error, Resp't Br. 8-9—as it must, given the overwhelming statutory authority that compels this conclusion.

2. The statutorily-unauthorized designation of Judge Munson likewise violated Article III. When a case is adjudicated by an Article III court, the members of that court must be Article III officers endowed with Article III protections. *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 244 (1850) ("the judges appointed to administer [the inferior federal courts] must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union"); see also *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality) ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."); Pet'r Br. 15-27.

Respondent asserts that as a general matter, "appeals coming from lower Article III courts and arising within the United States proper" must be heard by Article III courts, and concedes that Article III courts may not be "populate[d] ... with non-Article III judges." Resp't Br. 21-22. It goes on to argue, however, that the unorthodox composition of the Ninth Circuit was constitutional here because these cases arose in the District of Guam. *Id.* at 22-23. This contention fails.

Although it is true that Congress has great leeway in "establishing a court system for the Territories," *id.* at 24; Pet'r. Br. 20 & n.8 (recognizing same), this fact is simply beside the point. These are not cases about "courts created in the territories." *Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901).[1] No challenge has been raised to Guam's court system. These cases present appeals that were to be heard by the Ninth Circuit—which is an Article III court, as Respondent does not dispute. These cases, then, are about the constitutional limitations on the composition of an Article III court. The Ninth Circuit exercises the "judicial power of the United States," and must be staffed with Article III officials. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985) ("federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation"); cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 537 (1962) (plurality opinion of Harlan, J.) (in a case involving a panel of the Second Circuit, "the necessity for [an Article III] judge is uncontested").

Contrary to Respondent's argument, this constitutional command has no less force because these cases arrived in the Ninth Circuit pursuant to a statutory designation of jurisdic-

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[1] On this issue, Respondent conflates territorial *courts* and territorial *cases*. It is true that Article III places few if any limits on Congress's power to create territorial *courts*. The cases cited by Respondent stand for this proposition. Resp't Br. 23. It is not true, however, that rulings of this Court "confirm[] the inapplicability of Article III to the adjudication of territorial *cases*," *id.* (emphasis added), regardless of their venue.

tion. Resp't Br. 27 ("the passage of that *statutory* provision, did not expand petitioners' *constitutional* rights" (citation omitted)). Respondent's argument cannot be correct, for the entire jurisdiction of the lower federal courts is statutorily-created; indeed, those courts are dependent for their very *existence* on statutory grants of authority. U.S. Const. art. III, § 1; *Palmore* v. *United States*, 411 U.S. 389, 401 (1973). Respondent has failed to address this point, cf. Pet'r Br. 26-27 (raising same), and with good cause: On Respondent's reasoning, Article III would have *no* application to the lower federal courts, for the statutory creation of those courts could have no constitutional implications.

This absurd result is not the law. This Court has recognized that, wholly apart from Congress's statutory authority to create and shape the jurisdiction of the lower federal courts, the Constitution protects and defines the nature of those courts:

> The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

N. Pipeline, 458 U.S. at 64 n.15 (plurality) (citation omitted). This is only sensible—a federal court of appeals does not transmogrify into some other entity when it hears a certain type of case, or when it "conduct[s] a special sitting," Resp't Br. 25. Once Congress determined that cases like these would be heard by the Ninth Circuit, an Article III court, the Constitution placed limits on the manner in which that court could operate: "The final balance struck is a form of quid pro quo. If Congress desires the stamp of legitimacy that Article III courts provide, it cannot simultaneously undermine that legitimacy by impeding the independence of those courts." 15 *Moore's Federal Practice*, § 100.20[3][c], at 100-41 to -42 (Matthew Bender 3d ed. Mar. 1997) (footnote omitted).

As a functional matter, too, Respondent's theory is seriously flawed. When the Ninth Circuit hears appeals from territorial courts, its decisions have the same effect as other Ninth Circuit sittings. These panels hear and decide cases regarding federal law, the federal rules, and the Constitution—as occurred during the Ninth Circuit's February 2002 sitting in the Northern Mariana Islands, see Pet'r Br. 2 n.3 (describing cases). The decisions of such panels are accorded precedential weight by subsequent panels of that court, *United States* v. *Cruz*, 50 F.3d 714, 716 (9th Cir. 1995) (recognizing, in a case arising out of the District of Guam, that the panel's decision creates a circuit split); see *Murray* v. *Cable Nat'l Broad. Co.*, 86 F.3d 858, 860 (9th Cir. 1996) ("'[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent.'" (alteration in original)), and thereby bind the entire circuit. Contrary to Respondent's logic, therefore, these decisions do in fact apply to litigants in the many States that comprise the Ninth Circuit, as well as in the territories. Thus, on Respondent's theory, adjudicators other than Article III judges may create circuit-wide binding precedent on issues of federal law to be followed by Article III judges. This would raise serious questions about the constitutional separation of powers.[2]

Respondent's theory would create further difficulties. The same logic that would permit non-Article III adjudicators to sit on Article III courts for territorial and military appeals, Resp't Br. 22, would also apply to the numerous administrative appeals over which the federal courts have jurisdiction pursuant to a statute, not a constitutional command. See *Thomas*, 473 U.S. at 589; *N. Pipeline*, 458 U.S. at 67-70 (plu-

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[2] Respondent itself concedes that, as a general matter, "to populate Article III courts with non-Article III judges would likely violate the separation of powers" because "subjecting the decisions of Article III [judges] to the review of non-Article III judges ... would raise distinctive separation of powers concerns." Resp't Br. 22. Permitting non-Article III judges to establish precedent that binds Article III judges raises similar concerns.

rality); *e.g.*, 28 U.S.C. §§ 2342-2348 (enumerating agency appeals over which the federal appeals courts have jurisdiction).[3] For example, under Respondent's theory, the D.C. Circuit could create special panels that included non-Article III adjudicators to hear appeals of certain agency orders. Likewise, the Federal Circuit could be staffed by non-Article III judges to hear appeals from the Court of Federal Claims. See 28 U.S.C. § 1295(a)(3). And all of this would occur under the auspices of, and with the imprimatur of, the federal courts of appeals.[4]

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[3] The fact that Petitioners are residents of a United States territory and that Nguyen "is not even a United States citizen," Resp't Br. 25, does not change this analysis. *See Zadvydas* v. *Davis*, 533 U.S. 678, 699 (2001) (statute applicable to detention of aliens who have served sentences for criminal violations must be construed to avoid due process concerns).

[4] Respondent's theory of standing likewise falls short, as it simply begs the question. Resp't Br. 25-27. Respondent's contention that Article III has no application to the Ninth Circuit in these cases is not an issue of standing—it is the heart of the merits and, as such, it reduces Respondent's standing argument to the discredited claim that a party has no standing to raise a losing argument. *United States* v. *Richardson*, 418 U.S. 166, 207 (1974) ("to say that [a party] might ultimately lose his lawsuit certainly does not mean that he had no standing to bring it") (Stewart, J., dissenting). In fact, Petitioners satisfy the basic elements of standing, as they allege injury in fact, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This is true for Petitioners' statutory claim, which Respondent does not dispute, and with regard to their constitutional claims. Congress creates Article III courts; when it does so, the requirements of Article III and the Appointments Clause must be met with regard to those courts; and when those requirements are not met, individuals who claim an injury as a result of the failure to meet those requirements have standing to raise such claims.

Moreover, this Court has *never* employed the sort of standing analysis that Respondent proposes here with regard to challenges to an adjudicator's Article III authority. On Respondent's theory, standing would have been at issue in every case in which this Court denied a litigant's claim of right to an Article III tribunal. Such an analysis appears nowhere in the relevant case law. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923 (1991); *CFTC* v. *Schor*, 478 U.S. 833 (1986); *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *United States* v. *Raddatz*, 447 U.S. 667

3. Third, the designation of Judge Munson to sit on the Ninth Circuit violated the Appointments Clause of the United States Constitution. Only an individual nominated by the President and confirmed by the Senate to an Article III court may sit on a federal court of appeals. Pet'r Br. 27-29. Here, that requirement was not met. Judge Munson made his way onto the Ninth Circuit pursuant to the actions of the Chief Judge of the Ninth Circuit.

Respondent does not gainsay this underlying principle. Instead, it argues that the Appointments Clause does not "appl[y] to the governance of United States Territories." This argument misunderstands the constitutional values that the Appointments Clause serves to protect. The Appointments Clause is not simply a personal right, intended to provide a particular litigant with a particular sort of judge. In addition, the Appointments Clause more fundamentally relates to the basic structure of the federal government. It is "among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). By limiting the power of appointment, the Clause "ensure[s] political accountability for both the making of a bad appointment and the rejection of a good one." *Id.* at 660; see generally *The Federalist* No. 76 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Simply put—and as the ongoing debates in the Senate regarding confirmation demonstrate—the Appointments Clause allows the electorate to decide where to cast blame. Here, these structural safeguards came into play when Congress vested jurisdiction over these appeals in the Ninth Circuit. Yet the constitutionally-mandated procedure was not followed.

It is of no moment that Judge Munson was previously confirmed to the District Court for the Northern Mariana Islands. The fact that an official has been appointed to one position

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(1980); *Palmore* v. *United States*, 411 U.S. 389 (1973). And, practically speaking, claimants like Petitioners are the *only* ones who might conceivably raise such claims.

does not excuse the failure to observe the constitutional requirements of the Appointments Clause with regard to a second, separate position. Pet'r Br. 30-31. Nor, contrary to Respondent's argument, is sitting on the Ninth Circuit "germane to" serving as an Article IV official on the District Court for the Northern Mariana Islands. Resp't Br. 34. These two positions occupy wholly different roles in the constitutional structure—as evidenced by the fact that a territorial judge is not constitutionally qualified to sit on the Ninth Circuit.[5]

Respondent's proposal that germaneness be determined on a case-by-case basis, depending on the subject matter of a particular appeal, is unworkable. To determine germaneness based on the subject matter of a particular case would lead to absurd results, allowing non-Article III officials to sit on appellate courts for cases—but only those cases—concerning the area of their expertise. On that reasoning, FERC Commissioners could sit on the federal appellate courts for energy cases, FCC Commissioners for telecommunications cases, and so on. If the germaneness inquiry has any meaning, surely it must distinguish between Article III and non-Article III officials.

Nor may this error be excused on the theory that it was "limited," Resp't Br. 33, "isolated" and "brief," *id.* at 35; that it was not "deliberate[]," *id.* at 5; or because there is no "policy or practice" of such designations, *id.* at 35. Such limita-

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[5] Contrary to Respondent's argument, Resp't Br. 34, this argument casts no doubt whatsoever on the practice of Article III federal district court judges sitting by designation on the courts of appeals. Pet'r Br. 32 n.11. Article III judges have sat by designation since the Judiciary Act of 1789—a fact that is "contemporaneous and weighty evidence of [the Constitution's] true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled on other grounds*, *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935); *see also Lamar* v. *United States*, 241 U.S. 103, 118 (1916) (approving this practice). There is no comparable history (or, for that matter, statutory authority) to support the designation of *non*-Article III judges to sit by designation on Article III courts, and with good reason—this practice violates Article III.

tions, even assuming them to be true, are irrelevant to the Appointments Clause. "'[E]ven the most disinterested assertion of authority'" may lead to "'accretion of dangerous power,'" *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring); and, unlike Title VII or § 1983, the Appointments Clause requires no showing of "policy or practice." This Clause is a simple command, speaking "with admirable clarity," and must be obeyed as such. It is not susceptible to the type of "tinkering" or "balancing" that Respondent proposes here. *Id.* at 487 (Kennedy, J., concurring).[6]

For each of these reasons, the designation of Judge Munson to sit on the Ninth Circuit was error.

II. THESE MULTIPLE ERRORS REQUIRE THAT THE JUDGMENT OF THE NINTH CIRCUIT BE VACATED.

Where, as here, an error infects the composition of an appellate panel, this Court's practice is to vacate the decision below and remand for rehearing before a properly-constituted panel. Pet'r Br. 33-36; see *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132 (1947); *William Cramp & Sons Ship &*

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[6] Respondent also asserts that Petitioners waived their Appointments Clause argument by failing to raise it in their petitions for certiorari. To the contrary, this issue is "fairly included" in the question presented. Sup. Ct. R. 14.1(a); *see* Nguyen Pet. i ("Was the Ninth Circuit's judgment vitiated by the participation of a non-Art. III judge?"); Phan Pet. i (same). Moreover, the petitions for certiorari cited *Ryder* v. *United States*, 515 U.S. 177 (1995), a case that presented an Appointments Clause challenge, Nguyen Pet. 5; Phan Pet. 4-5; Nguyen Reply 4; emphasized that the "challenge is constitutional"; and objected generally to "a non-Art. III judge's *participation*," Nguyen Reply 4-5 (emphasis in original). The Brief for the United States in Opposition also cited *Ryder* and explained that it involved an Appointments Clause challenge. BIO 7.

In a related vein, the claim that Petitioner Nguyen "deliberately" waived her challenges to the composition of the panel in a "strategic" effort at "gamesmanship" is incredible, Resp't Br. 19, 37, 40, given the unlikelihood of review in this Court.

Engine Bldg. Co. v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913); *Moran* v. *Dillingham*, 174 U.S. 153, 157-58 (1899); *Am. Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893). A panel that contains an illegitimate adjudicator is "virtually no court at all." *William Cramp*, 228 U.S. at 652. Accordingly its judgment is "void," for it "affect[s] the administration of justice." *Am. Constr. Co.*, 148 U.S. at 387.[7]

Respondent purports to distinguish this line of authority by proposing a semantic distinction between 1) cases in which a judge's participation contravenes an "'express'" statutory prohibition, and 2) cases like these, in which a judge's participation is merely unauthorized. Resp't Br. 18 (emphasis omitted). This supposed distinction carries no weight, for the simple reason that, under Article III, the "inferior" federal courts may exercise only the jurisdiction that has been specifically granted to them; unless and until Congress grants them jurisdiction, they have none. In other words, *any* exercise of jurisdiction by the inferior federal courts is forbidden unless it has been specifically permitted. Here, Judge Munson exercised authority that was not granted to him—and which was, therefore, forbidden. He was "incompetent to sit at the hearing, the decree in which he took part was unlawful, ... and [it] should certainly be set aside or quashed." *Am. Constr. Co.*, 148 U.S. at 387.[8]

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[7] *Ex parte Ward*, 173 U.S. 452 (1899) is not to the contrary. *Cf.* Resp't Br. 16. That case held only that a judge's title cannot be challenged on a writ of habeas corpus. 173 U.S. at 454. Whatever the continued validity of this decision, it does not apply to cases like these, which come before this Court on direct review.

[8] For this reason, the error in these cases cannot be excused by the fact that the panel did contain two competent judges. *See* 28 U.S.C. § 46(d), *cited at* Resp't Br. 16. The defect here was not the absence of a quorum; it was the presence and participation of a statutorily- and constitutionally-disqualified judge. As the courts of appeals have repeatedly held, the presence of one disqualified judge on a multi-member panel requires that the judgment of the panel be vacated. Pet'r Br. 43 n.15 (citing cases);

This argument further ignores principles of statutory construction. Where a statute lists certain items, as 28 U.S.C. § 292(a) and its related provisions do here, it *does* preclude items not listed. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*"). Respondent's semantic distinction is legally incorrect.

Given the gravity of this error, it is simply extraordinary to suggest that it should be excused as merely "an internal judicial oversight" that was "isolated" and, more remarkable still, "unintentional"—as though Judge Munson appeared on the Ninth Circuit by accident. Resp't. Br. 5, 6, 30, 31, 32. Chief Judge Schroeder's motives (which apparently have been communicated to Respondent, see *id.* at 8), are irrelevant to this inquiry. Moreover, it is rank speculation to suggest that "there is no reasonable likelihood" that this mistake will recur, *id.* at 37; nothing in the record supports this remarkable assertion. It is more extraordinary still to suggest that the error that occurred here be ignored on this basis. Nothing in this Court's precedents supports the notion that an error—whether unique or not—should go uncorrected merely because one party has asserted that it will not recur.[9]

III. ALTERNATIVELY, THE JUDGMENT OF THE NINTH CIRCUIT MUST BE VACATED AS PLAIN ERROR.

Even under the rubric of "plain error," the judgment of the Ninth Circuit must be vacated, as each of the factors set forth in *United States* v. *Olano*, 507 U.S. 725, 731-32 (1993), are satisfied here. The designation of Judge Munson was errone-

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Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813, 830-31 (1986) (Brennan, J., concurring); *id.* at 831-33 (Blackmun, J., concurring).

[9] Nor may these issues be avoided simply because they are "delicate and difficult." Resp't Br. 5-6; *accord id.* at 32, 35. The doctrine of constitutional avoidance is meant to guide statutory interpretation, *see* Pet'r Br. 14-15; it does not permit, as Respondent would have it, the wholesale avoidance of squarely-presented constitutional issues that flow from a conceded statutory violation.

ous; it was obviously so; it affected Petitioners' substantial rights; and it affected the fairness, integrity or public reputation of the proceedings. *Id.*

1. The designation of Judge Munson to sit on the Ninth Circuit contravened Title 28, as Respondent concedes. Resp't Br. 8-9. It was likewise erroneous under Article III and the Appointments Clause, as set forth above. See *supra* 1-8.

2. Furthermore, this error was "plain," as is clear from Respondent's very confession of error. The United States Government has determined, at the highest levels, that the statutory error that occurred here is indefensible. It would be unusual indeed for an error to be so obvious to cause the Solicitor General to confess error, yet not obvious enough to be "plain."

Ample statutory authority supports Respondent's confession of error. The plain meaning of 28 U.S.C. §§ 292(a) and 451 precludes Judge Munson from sitting on an Article III court of appeals. Only a district judge may sit by designation on the federal courts of appeals, and Judge Munson sits neither in a "district" nor on a "district court," as those terms are defined by Title 28. Pet'r Br. 7-12. In addition, more than 20 different provisions of Title 28 make absolutely plain that the District Court for the Northern Mariana Islands is distinct from the federal district courts. *E.g.*, 28 U.S.C. §§ 119, 134(a), 333, 371, 373, 376(a)(1)(A) & (B), 452-459, 462, 610, 631, 753, 1291, 1292(a), 1295, 1346(b)(1); Pet'r Br. 12-14. And judicial authority confirms as much. This Court has held that non-Article III territorial courts are not "District Courts of the United States," see *Mookini* v. *United States*, 303 U.S. 201, 205 (1938); and the courts of appeals have likewise determined that such a court is not a "court of the United States," *Talbot* v. *McCarrey*, 218 F.2d 565, 566 (9th Cir. 1955), or a "district court," *United States* v. *Lewis*, 456 F.2d 404, 408 (3d Cir. 1972) (District Court of the Virgin Islands); *Wells* v. *United States*, 214 F.2d 380, 382-83 (5th Cir.

1954) (District Court of the Canal Zone). Given this weight of authority, the error was certainly "plain."

The constitutional errors that occurred here were similarly obvious. It is absolutely unheard-of—with the lone exception of a similar detour by the Ninth Circuit in the 1950s—for anyone other than Article III judges to sit on Article III courts. See *Glidden*, 370 U.S. at 597 (Douglas, J., dissenting) ("[N]o one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals."). Whatever difficulties Article III may present in other contexts, there is no ambiguity here. "'[T]he essential attributes' of judicial power" must be held by Article III judges, *N. Pipeline*, 458 U.S. at 81 (plurality), a proposition that serves as the common denominator for each of this Court's opinions to consider the constitutionally-permissible role of non-Article III officials. *E.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 851 (1986); *Thomas*, 473 U.S. at 587, 589-93; *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932). The irreducible minimum of Article III is that Article III courts must be staffed by Article III judges. That basic requirement was not met here.

The violation of the Appointments Clause that occurred here was similarly obvious. With "admirable clarity," *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring), the Appointments Clause requires that principal officers be nominated by the President and confirmed by the Senate. Respondent does not dispute that judges of Article III courts are principal officers. Accordingly, it follows, their selection must follow the constitutionally-prescribed procedure. Here, it did not. This error, too, was "plain."

3. Next, this error affected Petitioners' substantial rights. Petitioners satisfy this prong of the test both because the error was "structural" and, alternatively, because prejudice must be presumed under these circumstances. *Johnson* v. *United States*, 520 U.S. 461, 468-69 (1997); *Olano*, 507 U.S. at 739.

The presence of an impermissible adjudicator was structural error, for it "'affect[ed] the framework within which the [cases] proceed[ed].'" *Johnson*, 520 U.S. at 468; Pet'r Br. 37-40. There is nothing more fundamental to the structure of criminal adjudication than the judges and jurors who make up that process. Accordingly, this Court has recognized as a general matter that errors regarding the legitimacy of judges and jurors are structural. *E.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (lack of impartial trial judge); *Batson* v. *Kentucky*, 476 U.S. 79, 85-87, 100 (1986) (unlawful exclusion of jurors); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (unlawful exclusion of grand jurors).

More specifically, this Court has recognized that the type of error that occurred here is structural. *Glidden*, 370 U.S. at 535-37 (plurality) (challenge regarding participation of non-Article III adjudicators on an Article III panel is structural error); see also *Schor*, 478 U.S. at 851; *United States* v. *Albro*, 32 F.3d 173, 174 n.1 (5th Cir. 1994) (per curiam) ("the unauthorized delegation of sentencing authority from an Article III judicial officer to a non-Article III official affects substantial rights and constitutes plain error"). The same is true of Appointments Clause violations. *Freytag* v. *Comm'r*, 501 U.S. 868, 878-79 (1991). As the D.C. Circuit has observed, "Issues of separation of powers (including Appointments Clause matters), seem most fit to the [structural error] doctrine; it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry* v. *FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (citation omitted); see also *Silver* v. *USPS*, 951 F.2d 1033, 1045-46 (9th Cir. 1991) (O'Scannlain, J., dissenting) (Appointments Clause violation regarding 2 of 11 board members requires reversal).

Respondent fails to confront the structural nature of the error that occurred here. Instead, it repeatedly and mistakenly suggests that Petitioners' claim fails because they have not "establish[ed] prejudice." Resp't Br. 13; see also *id.* at 14

(asserting that Petitioners fail "to meet their burden of showing *actual* prejudice); *id.* at 15 (Petitioners failed to put forward "'direct evidence'"). This analysis misunderstands the third prong of the plain error test. Where, as here, structural error has occurred, both *Cotton* and *Johnson* make clear that prejudice need not be proved. *United States* v. *Cotton*, 122 S. Ct. 1781, 1786 (2002); *Johnson*, 520 U.S. at 468-69; see also *Glidden*, 370 U.S. at 533 (plurality) ("Article III, § 1, however, is explicit and gives the petitioners a basis for complaint *without requiring them to point to particular instances of mistreatment in the record*." (emphasis added)); *Landry*, 204 F.3d at 1131 (separation of powers "is a *structural safeguard* rather than a remedy to be applied only when specific harm ... can be identified."). And, for the reasons set forth above, the error that occurred here was structural. In any event, even where no structural error is at issue, certain categories of error lead to a presumption of prejudice, *Olano*, 507 U.S. at 739, and this is just such an error.[10]

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[10] In addition, Respondent's assertion that the trial evidence is overwhelming, is unsupported by the record. The evidence against Petitioners was breathtakingly thin. It showed that Phan picked up a package at the post office and took a "circuitous" route home, but did not open the package contained within the mailing (wrapped like a present) that concealed the drugs. The evidence suggested that Nguyen opened the "present," because she was arrested with dye-stain on her hands from the controlled-package delivery. The *only* other evidence was that the return address on the package matched that on the California driver's license of Nguyen's brother (who is also Phan's nephew). No other evidence was presented regarding any communications (whether by telephone, mail or otherwise) between parties in California and Petitioners in Guam. No evidence was presented regarding on-going drug dealing or other intent to distribute the drugs that were mailed to Guam by an unknown person. Accordingly, Petitioners challenged the sufficiency of the evidence, and the admission of the fact that the holder of the California driver's license was Nguyen's brother and Phan's nephew. Petitioners also objected that, as to the evidence of familial relations, their prejudice objection was never answered by Judge Unpingco—who merely ruled that the evidence was probative, rather than undertaking the required balance of its potential prejudicial effects. *See* Fed. R. Evid. 403.

As set forth in Petitioners' opening brief, where challenges to the authority of a judge are concerned, this Court has either presumed prejudice or required no showing of prejudice. Pet'r Br. 38-40, 42-44. In *Ayrshire Collieries*, the Court overturned the judgment of an improperly-constituted court of appeals precisely because it could not "say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance." 331 U.S. at 139. In *Moran*, it "set aside and quashed" the decision of the circuit court "without considering whether that decree was or was not erroneous in other respects." 174 U.S. at 158 (emphasis omitted). Likewise, the federal courts of appeals have declined to inquire into prejudice when the partiality of one member of a multimember panel is called into question. *E.g.*, *Berkshire Employees Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); Pet'r Br. 43 n.15 (citing additional cases).[11] This only makes sense, as it is impossible to determine what effect the challenged judge had on the outcome of the case, and it would be unseemly to undertake the necessary inquiry into the minds of the judicial decisionmakers to determine prejudice.

Olano demonstrates precisely why prejudice must be presumed here. In *Olano*, alternate jurors were improperly included in jury deliberations, an error that the Court reviewed for "plain error." 507 U.S. at 740. The Court declined to presume prejudice, noting that "the 2 alternate jurors were indis-

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Moreover, the opinion of the Ninth Circuit is incorrect in an important respect. It treats as significant circumstantial evidence of drug dealing the fact that $6000 was recovered during the arrest. However, the agent who performed the search recanted that testimony on cross-examination. Evidence concerning the recovery of the money was *not* cited by the United States in its brief to the Ninth Circuit, but nonetheless appeared in the opinion of the court and in Respondent's brief, *see* Resp't Br. 14.

[11] Similarly, judges are disqualified not just for actual, proven impropriety, but also for the *appearance* of impropriety: "'[J]ustice must satisfy the appearance of justice.'" *Lavoie*, 475 U.S. at 825.

tinguishable from the 12 regular jurors," and enumerating the ways in which the regular and alternate jurors were qualitatively identical. *Id.* The situation in *Olano* stands in marked contrast to the present cases, for Judge Munson is categorically distinct from the Article III judges who could rightfully have occupied his seat on the panel. Because he is not an Article III judge, he is statutorily and constitutionally prohibited from sitting on the Ninth Circuit. He does not possess life tenure. His salary is not guaranteed. In short, he is different in status and qualification from the Article III judges who might properly have sat on that panel. Unlike the *Olano* jurors, his participation was illegitimate as a threshold matter.

Furthermore, in *Olano* the jury was admonished that the alternate jurors should not participate in jury deliberations. Because jurors are presumed to obey instructions, it was appropriate to presume that the alternate jurors had not affected the deliberations of the jury. *Id.* Here, the opposite presumption obtains: It *must* be presumed that Judge Munson participated in the process of rendering judgment. After all, the "essence of the judicial function" is "the actual adjudication of the issues of law and fact." *Ayrshire Collieries*, 331 U.S. at 139. The very purpose of Judge Munson's participation was to engage in the deliberative process of appellate decisionmaking—to "exchange[] ideas and arguments in deciding the case." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring). It would be demeaning to Judge Munson to presume that he played no role in the adjudication of these cases.

It is precisely because appellate decisionmaking is both deliberative and secret that prejudice must be presumed in cases like these. It can never be known what effect a particular judge had on the deliberations, reasoning, and ultimate decision of an appellate panel—absent, of course, an evidentiary investigation that would require the testimony of the judges involved. The practical impossibility of such an inquiry is strikingly illustrated by the improper, extra-record asser-

tions—based themselves on *ex parte* communications—that populate Respondent's brief. *E.g.*, Resp't Br. 8, 11. Even leaving aside the absolute impropriety of these communications and this line of argument,[12] they demonstrate why an inquiry into prejudice is inappropriate where judicial conduct is concerned: A proper record cannot be created; evidence cannot be tested. In addition to the unseemliness of asking a judge to appear for a deposition in connection with his or her official duties, the inquiry itself would be profoundly disrup-

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[12] The argument that Petitioner Nguyen waived her challenge because of the supposed contents of a conversation between her attorney and Chief Judge Schroeder must be rejected, for it is not properly before this Court. This argument is premised entirely on extra-record evidence, which may not be considered. *Hopt* v. *Utah*, 114 U.S. 488, 491-92 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record ...; and not by *ex parte* affidavits of private conversations supposed to have afterwards taken place in his absence between the counsel and the clerk."); *see New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Russell* v. *Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record.").

Moreover, Respondent failed to raise any such argument in its Brief in Opposition to Petitioner Nguyen's Petition for a Writ of Certiorari. (Instead, Respondent made only the somewhat inconsistent argument that Petitioner's challenge to the composition of the panel was forfeited because it was *not* raised below. BIO 5.) Accordingly, Respondent's new argument is waived: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2; *see City of Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985).

Finally, given the *ex parte* communications in which counsel for Respondent and Chief Judge Schroeder seem to have engaged, these cases must be remanded to a different panel of the Ninth Circuit. Chief Judge Schroeder, who has continuing jurisdiction over these cases on remand, has communicated with one of the parties during the course of drafting its brief before this Court. Accordingly, the cases should be remanded to a different panel. See 28 U.S.C. § 455(a) (requiring recusal of a judge whose "impartiality might reasonably be questioned").

tive. An inquiry into the judicial decisionmaking process should be avoided by treating the error as harmful.

However, if this Court determines that an inquiry into prejudice is necessary, then the proper remedy is a remand for a hearing regarding the deliberations of the panel that heard these cases. Petitioners have had no opportunity to demonstrate that they were actually prejudiced by the participation of Judge Munson on the panel that heard their cases and, if a showing of prejudice is required, they should be afforded the opportunity to question the judges regarding Judge Munson's participation in the decisionmaking process.

4. Finally, this error affected the fairness, integrity or public reputation of the proceedings. These cases were adjudicated by a judge who was statutorily disqualified from doing so. The importance of this fact cannot be overemphasized. The composition of the Ninth Circuit in these cases was *illegal* and *unconstitutional*. Such a fact speaks directly to the integrity and public reputation of the proceeding, as this Court has repeatedly recognized.[13] In *William Cramp*, the Court held that a statutory defect in the composition of the appellate panel rendered it "virtually no court at all," and resulted in an "error of so grave a character, and involving considerations of public importance," that vacatur was required. 228 U.S. at 650, 652. Likewise, in *American Construction Co.*, the Court determined that the participation of a statutorily-disqualified judge "deeply affect[ed] the administration of justice in the Circuit Court of Appeals." 148 U.S. at 387.

It is no answer that "Judge Munson's character and abilities as a jurist ... stand unimpeached." Resp't Br. 19. See *Glid-*

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[13] Unlike *Cotton*, 122 S. Ct. at 1786-87, the requested relief in these cases would not threaten the "'fairness, integrity, and public reputation of judicial proceedings.'" It is not the case, as it was in *Cotton*, that Petitioners necessarily would receive a lesser sentence. Instead, Petitioners request only a rehearing of their appeals before a different, and properly constituted, panel of the Ninth Circuit.

den, 370 U.S. at 533 (plurality); *id.* at 589-90 (Douglas, J., dissenting) ("The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment.... The problem is an impersonal one, concerning the differences between an Article I court and an Article III court."). This argument is flawed in its presumption that Judge Munson is substantively equivalent to an Article III judge. As noted in the brief of *Amicus Curiae* Thomas K. Moore (a judge of the District Court of the Virgin Islands, who is statutorily and constitutionally equivalent to Judge Munson for present purposes), the neutrality of territorial judges *has* been questioned, because they are beholden to the President for reappointment: "[T]he mere perception that territorial judges might be subject to political pressure undermines the public's confidence in the independence of the judiciary." Thomas Moore Br. 1; see also *id.* 11 (noting that territorial judges are not "fully independent"); *id.* 12-13 (noting media reports that Judge Moore may not be reappointed as a result of certain rulings against the United States). Judge Moore's brief is a practical expression of the theory that underlies Article III: Article III courts must be filled exclusively by Article III judges possessing life tenure and an undiminished salary, in order to guarantee those judges independence from the Executive Branch.

In any event, to accept the suggestion that the error here should be forgiven based on Judge Munson's "character and abilities," would send this Court careening down a slippery slope, for the argument has no limiting principle. An Article IV judge stands in precisely the same shoes, for purposes of this analysis, as Article I adjudicators—including magistrate judges, bankruptcy judges, administrative law judges, and even officials of administrative agencies. Surely those officials may not populate the Article III courts, regardless of their "abilities." The only relevant inquiry is whether the adjudicator is an Article III judge. If not, the fact that he wears a robe and bears the title "judge" cannot preserve the integrity

of the invalid proceedings, regardless of his "character." *Glidden*, 370 U.S. at 604 (Douglas, J., dissenting) ("[W]e subtly undermine the constitutional system when we treat federal judges as fungible.").

Indeed, Respondent's suggestion that the judgment below be affirmed based on Judge Munson's supposed equivalence with an Article III judge is flatly incompatible with this Court's longstanding practice of vacating the decisions of improperly-constituted appellate panels. In the numerous cases cited above, see *supra* at 8-9; see also Pet'r Br. 33-36, 38-40, this Court has vacated outright the decisions of such panels.[14] Whether such an error is deemed "jurisdictional," "structural," "presumed prejudice"—or, to use the terminology of this Court's earlier cases, an error that rendered the panel's decision "void"—it remains clear that an inquiry into prejudice is inappropriate. The proper remedy is vacatur and remand to a new, properly-constituted panel of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth Circuit should be vacated and remanded for rehearing before a new, properly-constituted panel of that court.

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[14] For these same reasons, Respondent's argument regarding the *de facto* officer doctrine should be rejected. Respondent advocates the most expansive possible reading of this antiquated doctrine, and would permit *anyone* to sit on an Article III court, regardless of their qualifications, so long as they have color of title. Resp't Br. 20. This reading of the doctrine undermines the requirements of Article III; stands at loggerheads with this Court's practice of voiding the judgments of improperly-constituted appellate panels; and relies on an interpretation of nineteenth-century cases that is inconsistent with this Court's more recent discussion of the doctrine. *See, e.g., Glidden*, 370 U.S. at 535-36 (plurality). At most, this doctrine should be viewed as a species of forfeiture, which would not affect these cases for the reasons stated above.

Respectfully submitted,

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